Office-Supreme Court, U.S.
FILED
OCT 24 1966

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 146

JOAN FLORES DELANEY,
Petitioner,

vs.

UNITED SERVICES LIFE INSURANCE COMPANY,
Respondent.

PETITIONER'S MOTION FOR A REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, JOAN FLORES DELANEY, prays the Court to grant this her Motion for Rehearing on her Petition for Writ of Certiorari, previously filed herein to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on this cause on March 31, 1966.

QUESTIONS PRESENTED

1. When the constitution of a state contains a provision specifically prohibiting a retroactive law, are not Federal Courts sitting in that state required to honor said constitutional prohibition when deciding diversity cases based on state law only?

2. When the Congress of the United States duly enacts a law vesting a certain power only in a Justice of the Supreme Court of the United States, can a judge of a Circuit Court of Appeals usurp this power and authority and sign and enter an order which would not be void?

STATEMENT OF THE CASE

The statement of the case as previously filed herein in Petitioner's Original Application for Writ of Certiorari, pages 4, 5 and 6, is respectfully incorporated herein by reference.

REASONS FOR ALLOWANCE OF WRIT AND ARGUMENT

The Texas constitution, Article I, Sec. 16 reads as follows:

> "Sec. 16, no Bill of Attainder, Ex Post Facto Law, *Retroactive Law* or any law impairing the obligation of contracts shall be made."

It will be noted at this point that while the United States constitution makes no provision concerning retroactive law, the Texas constitution does. The Texas constitution goes further than the United States constitution because the former is not confined to forbidding Ex Post Facto Law, but it also contains a ban on any retroactive law. In prohibiting retroactive laws, the Texas constitution seeks to safeguard rights not guaranteed by other con-

stitutional provisions such as the impairment of the obligation of contracts and due process of law clauses. Petitioner cites *Mellinger* v. *The City of Houston,* 68 Texas 37, 3 S.W. 249, a case decided in 1887 in support and interpretation of the above.

A retroactive law is one named to act on things that are passed. As such, a statute or decision is retroactive which takes away or impairs vested rights acquired under existing laws or creates new obligations, imposes new duties or adopts a new disability in respect to transactions or considerations already passed, and which affects actions or rights accruing before it came into force.

In all fairness to Respondent, it must be noted that unless vested rights are destroyed or impaired the law is not invalid even though retroactive in operation. *Paschal* v. *Perez,* 7 Texas 384, decided in 1851, *City of Fort Worth* v. *Morrow,* Civ. App., 284 S.W. 274, error refused 1926. When the Fifth Circuit Court of Appeals decided the case of *Paul Revere Life Insurance Company* v. *First National Bank* in Dallas, Administrator of the estate of LOY THOMAS BROWN, Deceased, on the 31st day of March 1966, and then used that case giving it retroactive effect, as a legal precedent for the reversal of Petitioner's case in which a previous final judgment had been rendered on September 26, 1962, they clearly violate the above-quoted provision of the Texas constitution in that any form of retroactive law which interferes with a vested right is in clear violation of the Texas constitution. The record will reflect that the 1966 decision was permitted to reach back nearly four years and vacate the judgment in Petitioner's case, which was then a final judgment as defined by this Honorable Court in the case of *Linkletter* v. *Walker,* 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731, wherein this court stated that by final judgment it meant that the judgment

had been rendered, the availability of appeal had been exhausted, and the time for Petition for Certiorari had expired.

The following dates would be of assistance to this Court in determining the accuracy of Petitioner's statements made hereinabove:

1. September 26, 1962, opinion rendered by Fifth Circuit Division in Petitioner's case (R. p. 73).

2. October 26, 1962, Respondent's Motion for Rehearing denied (R. p. 105).

3. January 26, 1963, time for Certiorari had expired under Title 28 USCA, Sec. 2101 (c); no extension of time had been granted by a Justice of this Honorable Court as required by this statute. In attempting to circumvent the above-identified Federal statute, Judge John Minor Wisdom did on February 2, 1963 sign and enter the following quoted order. This order will be found in the 3rd supplemental transcript of record filed herein on page 1.

> "ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a further stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is further stayed to and including March 6, 1963 the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the

writ, or upon the expiration of the stay granted herein, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

Dated: *February 2, 1963*

/s/ John Minor Wisdom
United States Circuit Judge

(Original Filed February 2, 1963)"

Since the above order is obviously void due to lack of authority of Judge Wisdom to sign and enter same, it is elementary that Mrs. Delaney's judgment against the Respondent became a final judgment at that time.

4. March 31, 1966, PAUL REVERE decided and given retroactive effect to vacate 1 above.

When the above dates are compared with the indisputable evidence in the record, it becomes very evident that the action of the Fifth Circuit Court of Appeals is in clear violation of the Texas constitution, and its decision became final. The opinion of the Fifth Circuit Court of Appeals sitting en banc in the PAUL REVERE CASE was entered on March 31, 1966. The Fifth Circuit then gave it retroactive effect on the Delaney decision which had been rendered nearly four years prior to said date, which would clearly violate Art. I, Sec. 16 of the Texas Constitution hereinabove quoted.

Subsequent to Petitioner's Original Petition for Writ of Certiorari, the case of *D. D. Williams* v. *Mable S. McKnight,* was decided by the Supreme Court of Texas on May 4, 1966. This opinion will be found in 402 S.W.2d 505. The Texas Supreme Court held as follows concerning the Texas constitution at page 508 of its opinion:

> "Constitutional limitations are as binding upon the legislature as they are upon the judiciary."

W. Floyd Deacon v. City of Euless, Texas, Texas S. Ct., decided July 6, 1966, rehearing denied, July 27, 1966, reported in 405 S.W.2d 59. This opinion by Chief Justice Calvert touches on Art. I, Sec. 16 of the Texas constitution concerning retroactive or retrospective laws. We quote from page 62 of said opinion:

> "Sec. 16, Art. I, prohibits the making of retroactive laws insofar as they destroy or impair vested rights."

The Warren decision by the Supreme Court of Texas, which was rendered more than four years prior to the issuance of Lt. Delaney's insurance policy by the Respondent, clearly stated that the word passenger in an insurance policy would not exclude the pilot. This was the law in Texas then, and it is the law in Texas now because the Fifth Circuit Court of Appeals cannot legally change the state law of Texas. The March 31, 1966 opinion of the Fifth Circuit in the PAUL REVERE case could not legally be used as a precedent to change the law of Texas and the legal definition of passenger as laid down by its Supreme Court and secondly, even if the Fifth Circuit had the power to change the law of Texas, it could not make a decision retroactive in violation of the Texas constitution and thereby destroy Mrs. Delaney's vested right to the proceeds of her husband's insurance policy.

WHEREFORE, Petitioner prays the Court to grant this her Motion for Rehearing and to issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and that after hearing herein, the judgment of the Fifth Circuit Court of Appeals sitting en banc, be reversed and that the judgment of the Fifth Circuit sitting

in division as well as the judgment of the District Court of Texas, be in all things affirmed.

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CERTIFICATE

I do hereby certify that this Petition for Rehearing filed on behalf of Petitioner is presented in good faith and not for delay and that it is restricted to the grounds above specified.

HORACE P. SHELTON, JR.